JD(ATL)–07–05
Rockford, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

HH3 TRUCKING, INC. AND GRETCHEN HUDSON, ALTER EGO/JOINT EMPLOYER, AND WILLIAM HUDSON, ALTER EGO/JOINT EMPLOYER		
and	**CASES**	**33–CA–14571**
		33–CA–14616
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 325		**33–CA–14650**
		33–CA–14671
		33–CA–14737

Nicholas Ohanesian, Esq.,
for the General Counsel
Ms. Gretchen Hudson, of
Rockford, Illinois, for the Respondent
Mr. Thomas Streck, of
Rockford, Illinois, for the Charging Party

BENCH DECISION AND CERTIFICATION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on January 3 and 4, 2005 in Peoria, Illinois. After the parties rested, I heard oral argument on January 5, 2005 and issued a bench decision on January 7, 2005 pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations,[1] I certify the accuracy of, and attach hereto as

[1] The bench decision appears in uncorrected form at pages 326 through 361 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

At the beginning of the hearing, I granted the General Counsel's motion to amend paragraph 2(d) of the May 28, 2004 Complaint in Case 33–CA–14571 and the corresponding paragraph in the July 30, 2004 Consolidated Complaint in Cases 33–CA–14616, 33–CA–14650 and 33–CA–14671. This amendment does not affect my conclusions that the issue of Board jurisdiction is *res judicata* and that Respondent meets both the Board's statutory and discretionary standards for the exercise of jurisdiction.

The date on Volume 3 of the transcript is hereby corrected to read January 5, 2005 rather than January 3, 2005.

"Appendix A," the portion of the transcript containing this decision. The Conclusions of Law, Remedy, Order and Notice provisions are set forth below, following additional discussion of certain allegations.

As discussed in the "Procedural History" section of the bench decision, no single document sets forth all of the allegations litigated in this proceeding. Rather, the government raised the various allegations in three different pleadings. They are the May 28, 2004 Complaint and Notice of Hearing in Case 33–CA–14571, the July 30, 2004 Consolidated Complaint and Notice of Hearing in Cases 33–CA–14616, 33–CA–14650 and 33–CA–14671, and the December 15, 2004 Complaint and Notice of Hearing in Case 33–CA–14737. (Additional Orders consolidated these cases for hearing.)

Some allegations warrant further discussion. These allegations may be found in paragraphs 7 and 8 of the May 28, 2004 Complaint, in subparagraph 6(d) of the July 30, 2004 Consolidated Complaint, and in the December 15, 2004 Complaint.

May 28, 2004 Complaint Paragraph 7

In essence, Paragraph 7 of the May 28, 2004 Complaint alleges that Respondent signed a collective bargaining agreement with the Union but then failed to abide by it. Paragraph 7 divides up this allegation into 3 subparagraphs. Respondent has admitted the allegation in subparagraph 7(a) that on about April 1, 2004, it executed a collective bargaining agreement with the Union.

Subparagraph 7(b) of the May 28, 2004 Complaint alleges that "Since about April 1, 2004 the Charging Party has been requesting that the Respondent adhere" to this agreement. Respondent has denied this allegation.

Union Business Representative Streck sent a letter dated November 30, 2004 to Respondent's president. The letter reminded Ms. Hudson that the contract required Respondent to make contributions "on behalf of all employees for every hour worked" and further stated that there "have been no contributions made since you signed the agreement, on behalf of Arthur Johnson, Dennis Tenner, Todd Walker, Tim Oliver, Baltazar Davila or Edwardo Diaz."

However, the record does not establish that the Union requested Respondent to make such payments before the November 30, 2004 letter. Streck did testify that he had asked the funds to conduct an audit, but it is unclear when he made this request. I must conclude that between the signing of the contract on April 1, 2004 and Streck's November 30, 2004 letter, the Union did not press the matter.

On the other hand, the Union certainly did not convey in any manner that it intended to waive the health, welfare and pension provisions of the collective bargaining agreement or otherwise acquiesced in Respondent's delinquency. If the record establishes that Respondent failed to make the payments, that failure clearly breached the contract.

Subparagraph 7(c), which Respondent also has denied, alleges that since about April 1, 2004, Respondent has refused to adhere to the collective bargaining agreement and has refused

to apply its terms to the members of the bargaining unit. Subsequent Complaint paragraphs allege that by this action, Respondent engaged in an unfair labor practice affecting commerce in violation of Section 8(a)(5) and (1) of the Act.

Union Business Representative Streck testified that Respondent had failed to abide by the provisions of the collective bargaining agreement in a number of different ways, including a failure to make the health, welfare and pension fund payments already discussed. In crediting Streck's testimony that Respondent had made no such payments, I take into account both my observations of the witnesses and the fact that Respondent's President Hudson, who was present when Streck testified, did not deny this breach when she later took the stand.

Further, drivers Todd Walker and Darnell McLin testified that they received no benefits. Nothing in the record contradicts this testimony, which I credit.

Moreover, the General Counsel's subpoena directed Respondent to produce, among other records, "Documents, including but not limited to payments, credit card statements, receipts, and cancelled checks for HH3's payments to Health and Welfare Funds under the contract." It also sought the production of similar records pertaining to payments to the pension fund.

Notwithstanding the subpoena, Respondent failed to produce any documents which would establish it had made such payments. Obviously, Respondent would benefit by providing evidence that it had satisfied this obligation. Considering that neither legal process nor Respondent's self interest prompted it to disgorge these records, I conclude that such proof of payment does not exist,

Based on Streck's testimony that the funds did not receive any payments from Respondent, on the testimony of Walker and McLin that they did not receive any benefits, and Respondent's failure to produce any records showing that it had made such payments, I conclude that Respondent did not.

In sum, I conclude that the government has proven all allegations raised in subparagraphs 7(a), 7(b) and 7(c) of the May 28, 2004 Complaint in Case 33–CA–14571. Further, I conclude that by engaging in the alleged conduct, Respondent violated Section 8(a)(5) and (1) of the Act.

May 28, 2004 Complaint Paragraph 8

Subparagraph 8(a) of the May 28, 2004 Complaint alleges that since about February 6, 2004, Respondent has unilaterally reduced the size and work of the Unit by subcontracting out bargaining unit work resulting in reduced employment opportunities for unit members. Subparagraph 8(b) alleges that Respondent took this action because its employees assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities. Respondent has denied these allegations.

For clarity, it may be observed that the May 28, 2004 Complaint presents two separate sets of allegations concerning the subcontracting of unit work. All these allegations pertain to the same conduct but confusion might arise because of a difference in dates.

Complaint paragraph 6 focuses on the subcontracting as a refusal to bargain in violation of Section 8(a)(5) of the Act. It alleges that Respondent began the subcontracting on January 20, 2004.

Complaint paragraph 8 looks at this same subcontracting as discrimination violating Section 8(a)(3) of the Act, because the subcontracting had the effect of reducing the amount of work available to employees in the bargaining unit. It alleges that since "about February 6, 2004 and continuing to date, Respondent has unilaterally reduced the size and work of the bargaining unit by subcontracting out bargaining unit work."

At first glance, there appears to be a conflict between paragraph 6 and paragraph 8 concerning when Respondent began the subcontracting. However, I understand the paragraphs to allege that Respondent began the unilateral subcontracting on about January 20, 2004 but that the subcontracting did not cause a reduction in bargaining unit work until about February 6, 2004.

Paragraph 6 of the May 28, 2004 Complaint not only alleges that Respondent unlawfully subcontracted out unit work, it also alleges that Respondent sought to reduce the size of the bargaining unit "by unilaterally entering into fraudulent lease agreements with certain bargaining unit members." To prove this allegation, the General Counsel elicited testimony from two drivers, Todd Walker and Darnell McLin.

As discussed in the bench decision, I have found that Respondent violated Section 8(a)(5) when its president, Gretchen Hudson, went directly to Walker and McLin, without the Union's knowledge, and caused them to sign leases for the trucks they drove. Here, I revisit these same events to determine whether Respondent's conduct also constitutes the Section 8(a)(3) discrimination alleged in Complaint paragraph 8.

We must begin with this threshold question: Were Walker and McLin employees of Respondent at any time? This question is significant because Respondent's Gretchen Hudson testified that "we never had any employees, until 2004, when we were required to take Dennis Tenner and Arthur Johnson. We have never had any employees, sir. They have always signed Lease Agreements with us. So, we did not keep employee documents because we never considered any of them employees."

This testimony – that Respondent "never had any employees" – contradicts the position Respondent took in the previous Case 33–CA–14374. In that case, Respondent initially asserted that the four alleged discriminatees were not employees, but Respondent later withdrew that defense during the hearing before the Hon Ira Sandron. The Board adopted Judge Sandron's decision, which implicitly found that the four alleged discriminatees were employees. As to those individuals, Judge Sandron's decision is *res judicata*.

However, Judge Sandron did not find that *every* person driving a truck for Respondent was an "employee." To the contrary, his decision stated that the drivers fell into these three categories: (1) Respondent's employees, (2) owner–operators who own their trucks and contract

with Respondent, and (3) employees of temporary employment services who drive Respondent's vehicles.

Walker and McLin were not among the four discriminatees in the previous case, so their status is not *res judicata*. Arguably, they might fall into the second category. Indeed, at hearing, Respondent attempted to show that Walker possessed a Union card as an owner–operator.

Therefore, the possibility that McLin and Walker were independent contractors warrants serious consideration. In doing so, it should be noted that Respondent bears the burden of proving that Walker and McLin were not employees. *Community Bus Lines/Hudson County Executive Express*, 341 NLRB No. 61 (March 26, 2004)

McLin began working for Respondent as a truck driver in about April 2003. At one point during McLin's employment, President Hudson told him that he would have to sign an agreement to lease his truck from Respondent. McLin credibly testified that Hudson did not give him the opportunity to read the lease before signing it.

McLin also testified that he signed the lease in February 2003. However, his signature on this document appears above the date "2–6–04" and I find this date to be the correct one. McLin could not have signed the lease a year earlier because he did not begin working for Respondent until April 2003. However, McLin's error appears to have been inadvertent and, based upon my observations of the witnesses, I have considerable confidence in the reliability of his testimony.

In sum, McLin had been driving Respondent's truck for 9 to 10 months before Ms. Hudson told him to sign a lease agreement. During this time, he earned an hourly wage. Respondent has presented no evidence to carry its burden of proving that McLin was not an employee during this period. Accordingly, I conclude that at all relevant times, McLin was Respondent's employee within the meaning of Section 2(3) of the Act. For reasons stated below, I also conclude that signing the lease did not change his employment status.

On paper, the lease McLin signed imposed a number of significant obligations on him. However, Respondent did not ask McLin to comply with such terms and he did not. For example, the agreement stated, in part, that

> Lessee agrees to pay unto Lessor the sum of $500.00 as a deposit upon commencement of this lease and thereafter 50% of what truck makes per month, the first payment being due Weekly, and continuing with a like payment due the Every Friday of each and every month thereafter until such time as this lease is terminated in accordance with this Agreement.

(General Counsel's Exh. 4, underlining in original.) However, McLin did not tender the $500 initial deposit and Ms. Hudson did not ask him to do so.

Additionally, McLin did not pay Respondent "50% of what truck makes per month," as the lease required. McLin explained that Respondent never told him how much the truck made. Such information fell exclusively within Respondent's knowledge because the Hudsons, not

McLin, negotiated these rates with customers. They did so both before and after McLin signed the lease. At no time did McLin solicit work for the truck.

Although the lease required the lessee to pay for maintenance and repairs, Respondent never asked him to make such payments and McLin did not. However, Respondent did ask McLin to wash the truck and to put mud flaps on it at his own expense.

In determining whether an individual is an employee within the meaning of the Act, the Board applies a common law test which considers all of the incidents of the relationship between the individual and the putative employer. The Board does not give predominant weight to a putative employer's right to control the work of the individual. *Metro Cab Co., Inc.*, 341 NLRB No. 103 (April 30, 2004), citing *Roadway Package System*, 326 NLRB 842, 850 (1998) and *Stamford Taxi, Inc.*, 332 NLRB 1372 (2000).

In the present case, if the lease between McLin and Respondent had required McLin to pay regularly a fixed rental for the truck, that fact would be a significant indication that McLin was not an employee. However, the lease did not. As already noted, the lease purportedly required McLin to pay Respondent each week an amount equal to one–half of the truck's earnings, but Respondent did not enforce this provision. Indeed, Respondent never even told McLin how much money the truck generated.

Although the "right to control" test is not determinative, it still is significant that the lease did not diminish Respondent's control over McLin's work in any significant way. McLin did not act as an entrepreneur who sought business and independently scheduled his work to best serve his customers. Instead, McLin continued to perform work solely for Respondent, and went about it as he had before the lease.

McLin had no significant opportunity for entrepreneurial gain or loss. The truck he "leased" carried the Respondent's logo and McLin parked it in the same location as other vehicles owned by Respondent. Moreover, Respondent's failure to enforce the terms of the lease signifies that as a practical matter, this piece of paper did not alter McLin's relationship with Respondent in any appreciable way.

In sum, Respondent has not carried its burden of proving that McLin was not an employee and I find that he remained Respondent's employee after February 6, 2004. See *Community Bus Lines/Hudson County Executive Express*, 341 NLRB No. 61 (March 26, 2004), citing *Roadway Package System, Inc.*, 326 NLRB 842, 850 (1998); *Slay Transportation Co.*, 331 NLRB 1292 (2000). Further, I conclude that Respondent used the lease as a sham device to create the appearance of an independent contractor relationship when none existed.

Respondent's President Hudson also asked driver Todd Walker to sign a similar lease and he did so on February 6, 2004. At that time, Walker had been working for Respondent about 5 months.

According to Walker, when Hudson brought him the lease agreement she said, "just sign the papers and I will give you a copy of it later and go on, to work." Thus, Walker, like McLin, did not have the opportunity to review the lease before signing it.

Although Respondent's president solicited Walker to sign the lease, Respondent did not try to enforce its terms. For example, the lease provided that the lessee would pay a $500 deposit, but Respondent never asked for it and Walker never paid it.

Before signing the lease, Walker was an hourly employee. After he signed the lease, Respondent increased Walker's hourly wage rate, but he continued to receive a paycheck. Walker did not pay Respondent 50 percent of the truck's earnings, as required by the lease. He credibly testified that Ms. Hudson never showed him any records concerning how much revenue the truck was generating.

Although the lease obligated Walker to pay maintenance and repair bills, he never received any such bills and never paid for maintaining or repairing the truck. However, he did pay for mud flaps for the truck and also for washing it. On cross–examination, Walker also acknowledged that he paid for one–half the cost of gasoline and $100 per week for the truck's license fees.

Walker drove the truck only for Respondent and got his daily work orders by calling Respondent's office. He never sought work from any customers.

On one occasion, Walker decided not to work because of family problems, including his father–in–law's death. Although Ms. Hudson is Walker's aunt, it appears that the Hudsons did not believe Walker's claim that family problems had occasioned his absence. They asked him to take a drug test.

For the same reasons discussed above in connection with McLin's status, I conclude that Respondent has failed to meet its burden of proving that Walker's status changed from that of employee to independent contractor. As with McLin, Respondent used the lease to create an illusory impression that Walker was not its employee.

Further, I conclude that Respondent took these actions in an attempt to avoid its obligations under the National Labor Relations Act. In the previous Case 33–CA–24374, Respondent initially asserted that the four alleged discriminatees had not been employees. However, Respondent conceded their employee status at the hearing. Judge Sandron issued his decision on January 20, 2004 and, only 3 weeks later, Respondent had McLin and Walker sign the ostensible leases.

The timing alone does not suffice to establish an unlawful motive. However, also taking into account the animus Respondent demonstrated in the prior case – animus sufficient to warrant a *Gissel* bargaining order – I conclude that Respondent was trying to "immunize" McLin and Walker from the "disease" of employee status which befell the four discriminatees in Case 33–CA–24374.

Dealing unilaterally with McLin and Walker to remove them from the bargaining unit clearly constitutes bargaining in bad faith in violation of Section 8(a)(5), but here I must determine whether Respondent's actions amount to discrimination in violation of Section 8(a)(3).

To do so I will follow the framework the Board set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

As discussed in the bench decision, a *Wright Line* analysis begins with four questions. The first two concern, respectively, whether the alleged discriminatees engaged in protected activities and whether the Respondent knew it.

Here, the government asserts that Respondent discriminated against McLin and Walker as part of Respondent's effort to avoid its duty to recognize and bargain with the Union. By redefining its drivers to be "independent contractors," Respondent sought a bargaining unit with zero employees, which would eliminate its bargaining obligation. Thus, in this situation, the "protected activity" simply consisted of being employees in the bargaining unit. I conclude that the General Counsel has established the first two *Wright Line* elements.

Third, the government must prove that the alleged discriminatee suffered an adverse employment action. McLin and Walker did not see smaller paychecks after they signed the leases, but they did have to pay additional expenses. McLin had to pay for washing the truck and putting mud flaps on it. Walker paid $100 per week for license fees. He also paid for mud flaps and one–half the cost of gasoline.

These new expenses reduced their take–home pay. Therefore, I conclude that the government has proven that McLin and Walker suffered adverse employment actions.

Fourth, the General Counsel must establish a link between the protected activities and the adverse employment action. In the prior Case 33–CA–14374, the Board found that Respondent committed a number of serious unfair labor practices and ordered it to reinstate four discharged employees.

Two of them, Tenner and Johnson, accepted offers of reinstatement but Respondent soon discharged them unlawfully, as discussed in the bench decision. Respondent's asserted reasons, I concluded, were pretextual. Indeed, after Respondent fired Tenner, it offered him the opportunity to continue driving for Respondent as an independent contractor. It made a similar offer to Johnson. If Respondent really had fired them for work–related problems, it would not have invited them to continue essentially the same employment relationship with nothing changed except for a new label, "owner–operator."

These actions demonstrate that Respondent was intent upon destroying the bargaining unit by converting all drivers to supposed independent contractor status. Respondent was furthering the same plan when it told McLin and Walker to sign the truck leases. Therefore, I find a strong connection between the adverse employment actions suffered by McLin and Walker and their protected status as members of the bargaining unit.

In sum, the General Counsel has proven all four *Wright Line* elements. Respondent therefore bore the burden of presenting evidence to establish a legitimate business justification for its actions. Respondent has not carried that burden. Accordingly, I conclude that Respondent took the actions alleged in paragraphs 8(a) and 8(b) of the May 28, 2004 Complaint.

Section 8(a)(3) of the Act prohibits an employer from encouraging or discouraging membership in any labor organization by discrimination in regard to hire or tenure of employment or any term or condition of employment. 29 U.S.C. § 158(a)(3). At hearing, Respondent sought to establish that Walker retained membership in the Union by showing that he held a Union card. It may be argued that Respondent's attempt to convert Walker into an independent contractor was not discrimination which *discouraged union membership* because Walker did belong to the Union, in its special membership category for independent contractors.

Were I to accept this argument, I would still conclude that Respondent's effort to remove McLin and Walker from the bargaining unit violated Section 8(a)(1) and (5) and I would still recommend the same remedy. Thus, a failure to find an 8(a)(3) violation in these particular circumstances would not affect the recommended remedy.

All the same, I believe that the argument against an 8(a)(3) violation is pernicious, and I reject it. The term "union membership," as used in Section 8(a)(3), does not refer merely to holding a union card or paying union dues. It includes union representation, and removing someone from the bargaining unit certainly discourages union representation.

In sum, I conclude that by taking the actions alleged in subparagraphs 8(a) and 8(b) of the May 28, 2004 Complaint, Respondent violated Section 8(a)(3) and (1) of the Act.

July 30, 2004 Consolidated Complaint Paragraph 6(d)

Paragraph 6(d) of the July 30, 2004 Consolidated Complaint and Notice of Hearing alleges that "On a date certain but unknown in late June 2004, Respondent bypassed the Union and dealt directly with its employees in the Unit by negotiating terms and conditions of employment with Arthur Johnson."

Johnson, a driver, testified as follows: During a telephone conversation on June 21, 2004, Respondent's president, Gretchen Hudson, discharged him. When Johnson asked about getting his job back, Ms. Hudson told him to call her later. The next day, Johnson telephoned Ms. Hudson and asked for his job back. She replied, "you hurt me a lot and you hurt us and the $50,000.00 in Court costs because of, you know, me and other people." Ms. Hudson then offered to let Johnson resume driving for Respondent if Johnson entered into a lease agreement. Under the proposed arrangement, Johnson would pay half of the truck's operating costs.

Ms. Hudson was present when Johnson gave this testimony. Ms. Hudson took the witness stand later in the hearing but did not contradict Johnson. Based on my observations of the witnesses, and also noting that Ms. Hudson did not deny the statements Johnson attributed to her, I credit Johnson's testimony.

For the reasons discussed in the bench decision, I have concluded that Johnson's June 21, 2004 discharge violated Section 8(a)(3) and (1) of the Act. Because the discharge was unlawful, he remained Respondent's employee at the time Ms. Hudson offered to allow him to resume work under the different terms she proposed. She did not notify the Union of this proposed change or offer to bargain about it.

In these circumstances, I conclude that the government has proven the allegations in paragraph 6(d) of the July 30, 2004 Consolidated Complaint.

December 15, 2004 Complaint in Case 33–CA–14737

In part, the December 15, 2004 Complaint in Case 33–CA–14737 refers to the same allegations in the other cases consolidated into this proceeding. However, it also raises one new matter. Subparagraph 9(a) alleges that since about September 2004 and continuing to date, Respondent has subcontracted out all work performed by members of the bargaining unit. Subparagraph 9(b) alleges that Respondent did so because its employees assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. Subparagraph 10(b) alleges that this conduct violated Section 8(a)(1) and (3) of the Act.

At the January 3, 2005 hearing, Respondent failed to produce its personnel records, which had been subpoenaed by the General Counsel. Such records would have established how many employees Respondent had employed at various material times. When called upon to explain the failure to produce these documents, Respondent's President Hudson gave the following testimony:

> We — we never had any employees, until 2004, when we were required to take Dennis Tenner and Arthur Johnson. We have never had any employees, sir. They have always signed Lease Agreements with us. So, we did not keep employee documents because we never considered any of them employees.

As noted above, Ms. Hudson's testimony is incorrect and contradicts Respondent's position in the previous case before Judge Sandron. In that matter, Respondent conceded the employee status of the alleged discriminatees.

Both this inconsistency and Ms. Hudson's failure to produce the subpoenaed records raise considerable doubts about the reliability of her testimony. To the extent that Ms. Hudson's testimony conflicts with other evidence, I do not credit that testimony.

Additionally, Respondent's failure to produce the subpoenaed documents itself constitutes relevant evidence. In general, a judge should be quite cautious about drawing or relying upon any adverse inference because, at best, an inference stands at one remove from fact. See, e.g., *Dasal Caring Centers, Inc., d/b/a Lemay Caring Center*, 280 NLRB 60 (1986). However, several factors in the present case make it appropriate here to draw an adverse inference from Respondent's noncompliance with the subpoena and to accord the inference more than minimal weight as evidence.

First, the Board previously found Respondent guilty of unfair labor practices and the United States Court of Appeals for the Seventh Circuit enforced the Board's Order. The Court entered its Order on September 14, 2004, so it certainly does not constitute "ancient history" irrelevant to Respondent's conduct in the present matter. To the contrary, the alleged violations here represent a continuation of Respondent's previous unlawful conduct. For example, Respondent discharged for a second time the employees it had been compelled to reinstate.

Respondent's recent history of unfair labor practices makes it more likely that the missing records would document the unlawful conduct.

Second, Respondent's stated reason for failing to produce the subpoenaed personnel records – that it kept no personnel records because it never had any employees – is demonstrably false. In Ms. Hudson's testimony, quoted above, she claimed that Respondent never had employees because drivers "have always signed lease agreements." However, McLin drove a truck for Respondent for 9 months, and Walker for 5, before signing such agreements. Thus, even if signing the leases had transformed them into independent contractors, they had been employees before that time.

The subpoena sought personnel records for the period June 1, 2003 to August 30, 2004. McLin and Walker clearly were employees during at least part of this period.

Moreover, in the hearing before Judge Sandron, Respondent had conceded the employee status of the four discriminatees, Candley, Downey, Johnson and Tenner. They, too, had worked for Respondent during portions of the time period covered by the subpoena. Yet Respondent produced no records for any of them.

Thus, Respondent's claim that it kept no personnel records because it had no employees flies in the face of convincing evidence that it did have employees. The fact that Respondent's asserted justification is manifestly false raises the suspicion that it is pretextual.

Third, Respondent's assertion that it kept no personnel records must be considered in light of the record–keeping requirements imposed upon employers by other laws. For example, federal immigration law requires employers to complete and retain records for each person hired. See, e.g., 8 U.S.C. Section 1324a(b). It would appear unlikely that Respondent simply disregarded these laws. Additionally, Respondent's employees were truck drivers, and it is difficult to believe that Respondent failed to maintain personnel records documenting that they held commercial driver licenses.

Moreover, the December 9, 2003 injunction issued by the United States District Court requires Respondent to maintain records and to provide them to the Board under certain circumstances. Specifically, the Court ordered Respondent to offer interim employment to the four discriminatees in Case 33–CA–14374, who included the two employees, Dennis Tenner and Arthur Johnson, also named as discriminatees in the present matter. The injunction further directed that at "all times that interim employment is not available for any of the discriminatees," Respondent would maintain and send to the Board by facsimile the following records, updated bi–weekly:

(i) daily billing records, including but not limited to daily truck records (a.k.a. time sheets) for all work performed by the Respondent and for whom including work performed by owner–operators working for the Respondent;

(ii) payroll records, including but not limited to pay stub details, showing the names, hours worked, rates of pay for all drivers employed by the Respondent including owner operators working for the Respondent;

(iii) records of temporary employees utilized by the Respondent, including but not limited job orders and invoices for temporary employees.

Additionally, the Court's Order explicitly enjoined Respondent from, among other things, "transferring or subcontracting bargaining unit work without providing the Union with notice and opportunity to bargain."

Thus, the injunction assured not only that Respondent would provide interim employment to the four discriminatees (including Tenner and Johnson) but also that Respondent would not transfer such work outside the bargaining unit unilaterally. Should Respondent claim that a downturn in available work made it necessary to lay off any discriminatee, it had to keep records which would reveal whether it had secretly siphoned any work out of the bargaining unit. More than that, it had to fax such records to the Board.

In other words, the injunction imposed upon Respondent very specific record–keeping requirements. Respondent triggered these record–keeping requirements when it discharged Tenner and Johnson.

By terminating the employment of Tenner and Johnson, and then promptly offering to let them do the same work as independent contractors, Respondent contravened the injunction in two ways: The discharges flouted the Court's direction that Tenner and Johnson be given interim employment, and Respondent's offer to let them do the same work as owner–operators ignored the prohibition against transferring or subcontracting bargaining unit work without first notifying the Union. As of May 11, 2004, when it fired Tenner and thereby made interim employment unavailable to him, Respondent came under a duty to keep the records required by the injunction and to fax them periodically to the Board.

Ms. Hudson's testimony that Respondent possessed no personnel records is particularly incredible considering that Respondent had both the general statutory duty to keep certain documents and the specific obligation imposed by the injunction, discussed above. Arguably, an employer might fail to comply with a statutory record–keeping requirement because unaware of the law, but Respondent cannot plead that it was ignorant of the federal court's injunction.

Fourth, the General Counsel's subpoena sought information primarily within Respondent's control. To a significant extent, Respondent's records provide the definitive means of ascertaining how many employees worked in the bargaining unit at any given time. The demonstrably incorrect testimony of Respondent's president on this issue makes the documentary evidence uniquely important, and Respondent's failure to comply with the subpoena foresee ably frustrates a determination of the truth.

Accordingly, Respondent's noncompliance with the subpoena makes it necessary to rely upon secondary evidence. In the circumstances discussed above, it also warrants drawing the inference that the subpoenaed documents support the government's allegation that Respondent had reduced the size of the bargaining unit to zero employees. *International Association of Heat and Frost Insulators and Asbestos Workers Local No. 53 (Insul–Contractors, Inc.)*, 262 NLRB 934 (1982).

Drawing this adverse inference, I find that since about September 2004, and continuing to date, Respondent has subcontracted out all work which had been performed by members of the

bargaining unit. Accordingly, I conclude that the General Counsel has proven the allegation raised in subparagraph 9(a) of the December 15, 2004 Complaint.

Analyzing the facts under *Wright Line*, above, I conclude that the government has established that the members of the bargaining unit engaged in protected activity by selecting the Union to represent them, that Respondent knew of this activity, and that the bargaining unit members suffered an adverse employment action, namely, loss of employment when Respondent subcontracted out their work. Further, based upon the animus established in the previous Case 33–CA–14374, I find a link between the employees' protected activity and the adverse employment action.

Respondent bears the burden of establishing that it would have subcontracted out all bargaining unit work even in the absence of the employees' protected activity. Respondent has not met this burden. Accordingly, I find that the government has established that Respondent discriminated against these employees, by terminating their employment, in violation of Section 8(a)(3) and (1) of the Act.

The December 15, 2004 Complaint in Case 33–CA–14737 raises one other allegation meriting discussion. Subparagraph 5(d) of that Complaint alleges that "Respondent HH3 and Respondents Gretchen and William Hudson are jointly and severally liable for remedying Respondent HH3's unfair labor practices as found by the Board *in Case 33–CA–14374*." (Emphasis added.) Because the Board has already made such a determination in Case 33–CA–14374, because that determination has *res judicata* effect in the present matter, and because I have no jurisdiction over Case 33–CA–14374, it is unnecessary for me to reach any conclusions of law this allegation.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix B.

Respondent had caused its bargaining unit employees to sign leases which purportedly changed their status to independent contractors. Pursuant to those leases, Respondent also has required employees to pay certain expenses associated with maintaining the "leased" equipment. As part of the remedy, Respondent must rescind such leases and make its employees whole, with interest, for all losses suffered in connection with those leases.

Respondent must also offer immediate and full reinstatement to Dennis Tenner and Arthur Johnson, and make them whole, with interest, for all losses they suffered because of Respondent's discrimination against them. Further, Respondent must offer immediate and full reinstatement to the other members of the bargaining unit who lost their employment when Respondent subcontracted out all unit work.

As discussed above, Respondent began subcontracting out bargaining unit work unlawfully on about January 20, 2004, which reduced the size of the bargaining unit beginning about February 6, 2004. Respondent continued to subcontract bargaining unit work until, by some time in September 2004, it reduced the number of bargaining unit employees to zero. Respondent must remedy the effects of this unlawful subcontracting, both by making whole every employee who suffered losses because of the subcontracting and by reinstating employees to the positions they lost because of the subcontracting.

In sum, Respondent must restore the status quo which existed on January 20, 2004. If a dispute arises concerning the nature of this status quo ante, I recommend it be resolved in a compliance proceeding.

Respondent also has failed to abide by the terms of the collective–bargaining agreement it entered into with the Union on April 1, 2004. Respondent must make whole, with interest, all bargaining unit employees for all losses resulting from Respondent's failure to apply to agreement. As part of this make whole remedy, Respondent must make contributions to the health, welfare and pension funds in the manner prescribed by the collective–bargaining agreement for all employees employed in the bargaining unit at any time on or after April 1, 2004, so that the arrearage is fully satisfied.

The corporation's sole owners, Gretchen Hudson and William Hudson, should be held individually responsible to remedy the unfair labor practices. As stated in the bench decision, after a compliance hearing in Case 33–CA–14374, the Hon. Michael A. Rosas issued a supplemental decision in which he concluded that the "corporate veil" should be pierced and that the Hudsons should be held individually liable. The Board adopted this conclusion. Accordingly, the issue is *res judicata*.

Moreover, Ms. Hudson's testimony in the present case clearly establishes that the practice of commingling personal and corporate funds and assets has continued. Ms. Hudson testified that, to prevent corporate checks from bouncing, the Hudsons refinanced their home and placed $20,000 in the corporate account, then drew on it to pay for personal purchases. Thus, the failure to maintain corporate formalities persists; no new circumstance exists which might call into question the *res judicata* effect of the Board's prior decision.

The General Counsel seeks a broad cease and desist order because of Respondent's unfair labor practices in the previous Case 33–CA–14374. I believe such an order is warranted both because of these unfair labor practices, and because of Respondent's failure to comply with the Board's Order in Case 33–CA–14374 and with an injunction issued by the United States District Court for the Northern District of Illinois.

As discussed above, on December 9, 2003, District Judge Philip G. Reinhard issued an injunction which prohibited Respondent from, among other things, discharging employees because of the Union and/or protected concerted activity and from transferring or subcontracting bargaining unit work without providing the Union with notice and an opportunity to bargain. Notwithstanding the injunction, Respondent transferred all work out of the bargaining unit and thereby discharged its employees.

On September 14, 2004, the United States Court of Appeals for the Seventh Circuit entered a judgment enforcing the Board's order in Case 33–CA–14374. The Court ordered Respondent to cease and desist from discharging employees for their activities on behalf of the Union, from transferring work out of the bargaining unit without notifying the Union and affording it an opportunity to bargain over the action and its effects, and from "in any manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act."

By the date of this Order, Respondent already may have terminated all bargaining unit employees. (Absent the subpoenaed records, which Respondent failed to produce, that date cannot be determined exactly.) But regardless of whether Respondent's unfair labor practices in the present cases violated the Circuit Court's Order, they certainly were inconsistent with the District Court's injunction. Accordingly, I recommend that the Board issue a broad cease and desist order.

CONCLUSIONS OF LAW

1. The Respondent, HH3 Trucking, Inc., Gretchen Hudson, an Individual and William Hudson, an Individual, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, International Brotherhood of Teamsters, Local 325, is a labor organization within the meaning of Section 2(5) of the Act.

3. Since about June 23, 2003, the Charging Party has been the designated exclusive collective bargaining representative of the following unit, which constitutes an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

> All full–time and regular part–time drivers employed by Respondent at its Rockford, Illinois facility, EXCLUDING owner–operators, office clerical and professional employees, guards and supervisors as defined in the Act.

On April 1, 2004, the Respondent and the Charging Party entered into a collective–bargaining agreement setting the terms and conditions of employment for the employees in this unit.

4. Since about February 6, 2004, Respondent has violated Section 8(a)(3) and (1) of the Act by unilaterally reducing the size and work of the bargaining unit by subcontracting out bargaining unit work, resulting in reduced employment opportunities for unit members.

5. On about May 11, 2004, Respondent violated, and continues to violate, Section 8(a)(3) and (1) of the Act by discharging its employee Dennis Tenner and thereafter failing and refusing to reinstate him.

6. On about June 21, 2004, Respondent violated, and continues to violate, Section 8(a)(3) and (1) of the Act by discharging its employee Arthur Johnson Jr. and thereafter failing and refusing to reinstate him.

7. Since some time in September 2004, and continuing thereafter, Respondent discriminated and continues to discriminate in regard to terms and conditions of employment in violation of Section 8(a)(3) and (1) by subcontracting out the entire work of the bargaining unit described in paragraph 3, above, resulting in loss of employment for bargaining unit members and reducing membership in the bargaining unit to zero.

8. Since about January 20, 2004, and at all material times thereafter, the Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting out the work performed by members of the bargaining unit described in paragraph 3, above, and by seeking to reduce the size of the bargaining unit by unilaterally entering into fraudulent equipment lease agreements with certain bargaining unit members, without providing the Charging Party notice or an opportunity to bargain about such changes.

9. Since about April 1, 2004 and at all material times thereafter, Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to adhere to and apply the terms of the collective–bargaining agreement described above in paragraph 3.

10. About June 22, 2004, Respondent violated Section 8(a)(5) and (1) of the Act by bypassing the Charging Party and negotiating directly with bargaining unit employee Arthur Johnson concerning the terms and conditions of his employment.

11. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

12. The Respondent did not engage in any unfair labor practices alleged in the Complaints which are not specifically found herein.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[2]

ORDER

The Respondent, HH3 Trucking, Inc., Gretchen Hudson and William Hudson, their officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Discriminating against members of the bargaining unit by contracting out bargaining unit work.

(b) Discriminating against employees Dennis Tenner and Arthur Johnson by discharging and refusing to reinstate them.

[2] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

(c) Dealing directly with bargaining unit employees concerning terms and conditions of their employment without first providing the Charging Party with notice and an opportunity to bargain.

(d) Refusing to apply the terms of the collective–bargaining agreement it entered into with the Charging Party.

(e) Reducing the size of the bargaining unit by unilaterally subcontracting out bargaining unit work.

(f) In any other manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to Dennis Tenner and Arthur Johnson and make them whole, with interest, for all losses they suffered because of Respondent's unlawful discrimination against them.

(b) Rescind all purported equipment lease agreements it entered with employees or and after January 20, 2004, and make all such employees whole, with interest, for all losses they suffered in connection with those lease agreements.

(c) Make whole, with interest, each and every employee who worked in the bargaining unit at any time on or after January 20, 2004 for all wages and benefits lost because Respondent unlawfully contracted out bargaining unit work.

(d) Offer immediate and full reinstatement to all employees whose employment was terminated on or after February 6, 2004 because Respondent unlawfully subcontracted out bargaining unit work, and make them whole, with interest, for all losses they suffered because of Respondent's action.

(e) Make whole, with interest, each and every employee who worked in the bargaining unit at any time on or after April 1, 2004 for all losses suffered because Respondent failed to adhere to and apply the collective–bargaining agreement it had entered into with the Charging Party.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facilities in Rockford, Illinois, copies of the attached notice marked "Appendix A."[3] Copies of the notice, on forms provided by the Regional Director for Region 14, Subregion 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 20, 2004.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C.

Keltner W. Locke
Administrative Law Judge

[3] If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading **"POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD"** shall read **"POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."**

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Bench Decision

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. The General Counsel of the National Labor Relations Board (whom I will call the "General Counsel" or the "government") has alleged that Respondent violated Sections 8(a)(1), (3) and (5) of the Act. I find that the government has proven these violations. Further, I conclude that Respondent's owners, Gretchen Hudson and William Hudson, should bear individual liability for the unfair labor practices of the corporation. Additionally, I recommend that the Board act quickly to assure that corporate assets will not be dissipated before Respondent has fully remedied its unfair labor practices.

Background

The General Counsel seeks a broad cease and desist order in this case, in part because of Respondent's previous unfair labor practices. Therefore, it may be helpful to begin by summarizing previous cases.

At all material times, Respondent has been engaged in the trucking industry, hauling construction materials for commercial customers in Northern Illinois. Teamsters Local 325, International Brotherhood of Teamsters, AFL–CIO, which I will refer to as the "Charging Party" or the "Union") petitioned in Case 33–RC–4792 to represent a unit of truck drivers employed by Respondent.

The Union and Respondent agreed that some drivers should be excluded from the bargaining unit because they were independent contractors rather than employees of Respondent. However, they could not agree about the status of all of the drivers, resulting in a representation hearing.

On August 5, 2003, the Regional Director for Region 14 of the Board issued a Decision and Direction of Election which found the following unit of Respondent's employees to be appropriate for collective bargaining:

> All full–time and regular part–time drivers employed by the Employer at its Rockford, Illinois facility, EXCLUDING owner–operators, office clerical and professional employees, guards and supervisors as defined in the Act.

This is the only bargaining unit involved in either the prior cases or the present case, and I will refer to it as the "bargaining unit" or, more simply, as the "Unit." In his Decision and Direction of Election, the Regional Director also held that the drivers in question were Respondent's employees rather than independent contractors. Accordingly, they were members of the Unit.

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On August 18, 2003, the Union filed an unfair labor practice charge against Respondent in Case 33–CA–14374. The Regional Director, acting on behalf of the General Counsel, issued a Complaint in this matter on September 23, 2003. Additionally, the General Counsel sought and obtained an injunction from the United States District Court for the Northern District of Illinois, Western Division. That injunction will be discussed later in this decision.

On October 20 to 22, 2003 and December 2, 2003, the Hon. Ira Sandron, Administrative Law Judge, conducted a hearing in Case 33–CA–14374, and issued a Bench Decision on December 3, 2003. Judge Sandron certified the Bench Decision on January 20, 2004. No party filed exceptions and, on March 18, 2004, the Board adopted Judge Sandron's findings and conclusions and ordered Respondent to comply with Judge Sandron's order.

In the Decision adopted by the Board, Judge Sandron found that Respondent was an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act and that the Union was a labor organization within the meaning of Section 2(5) of the Act. Further, the Decision found that as of June 23, 2003, a majority of bargaining unit employees had designated the Union to represent them and that accordingly, since June 23, 2003 the Union had been the exclusive collective–bargaining representative, under Section 9(a) of the Act, of the employees in the Unit.

The Decision also found that Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union activities, promising employees a pay raise if they refrained from selecting the Union to represent them, threatening to discharge employees if they selected the Union, threatening to close the business if employees selected the Union, telling employees not to sign union cards or speak with union representatives, telling employees that they were fired for having engaged in union activities, and telling employees that Respondent would be subcontracting out bargaining unit work in retaliation for the employees' union activities.

Additionally, the Decision found that Respondent violated Sections 8(a)(3) and 8(a)(1) by discharging the following employees: Keith Candley, Joseph Downey III, Arthur Johnson Jr., and Dennis Tenner. Moreover, the Decision found that Respondent violated Sections 8(a)(5) and 8(a)(1) of the Act by transferring work out of the bargaining unit without notifying the Union or affording it an opportunity to bargain.

The Decision ordered Respondent to cease and desist from these unfair labor practices or "in any manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act." Further, the Decision ordered Respondent to take certain affirmative actions, including offering full reinstatement, with backpay, to the four drivers who had been unlawfully discharged, and to bargain with the Union on request.

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As already noted, the Board adopted Judge Sandron's Decision on March 18, 2004. On July 8, 2004, the Board petitioned the United States Court of Appeals for the Seventh Circuit to enforce this Decision. Additionally, on July 19, 2004, the General Counsel issued a Compliance Specification and Notice of Hearing which named as Respondent HH3 Trucking, Inc. and its two owners, Gretchen Hudson and William Hudson.

On August 18, 2004, the Hon. Michael A. Rosas, Administrative Law Judge, conducted a compliance hearing in Peoria, Illinois, to determine the amount of backpay which Respondent owed to the four discriminatees to make them whole. To place the compliance proceeding in context, I will return briefly to the proceeding which the General Counsel brought in the United States District Court for the Northern District of Illinois, Western Division. Pursuant to Section 10(j) of the Act, the Hon. Philip G. Reinhard, District Judge, issued a temporary injunction on December 9, 2003.

The injunction required Respondent to take a number of actions, including offering interim employment to Candley, Downey, Johnson and Tenner and bargaining with the Union on request. Respondent did tender such offers of reinstatement. Johnson and Tenner returned to work on April 6, 2004. The other two discriminatees did not accept Respondent's offers of reinstatement.

In the Board's compliance proceeding, Judge Rosas issued an October 24, 2004 Supplemental Decision which ordered Respondent to pay Johnson $16,562.25 and Tenner $12,274.88, plus interest. Respondent did not file exceptions to this Supplemental Decision and the Board adopted it by Supplemental Decision dated December 10, 2004. The present record does not establish that Respondent has satisfied this obligation.

This summary of events in the prior unfair labor practice case will conclude with one additional fact. On September 14, 2004, the United States Court of Appeals for the Seventh Circuit issued a Judgment enforcing the Board's March 18, 2004 Order in Case 33–CA–14374.

The procedural chronology in the present matter overlaps the events in Case 33–CA–14374, just described. However, for clarity, I will discuss the actions in the cases now before me separately in the next section of this decision.

Procedural History

The present matter began April 9, 2004, when the Union filed its initial charge in Case 33–CA–14571. This charge, which the Board served on Respondent by mail on April 12, 2004, alleged that Respondent subcontracted bargaining unit work in violation of Section 8(a)(1), (3), (4) and (5) of the Act. The Union amended this charge on May 28, 2004, which resulted in the deletion of the Section 8(a)(4) allegation.

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On May 14, 2004, the Union filed a charge against Respondent in Case 33–CA–14616. This charge alleged that Respondent, on or about May 11, 2004, suspended and/or discharged Dennis Tenner in violation of Section 8(a)(1), (3) and (4) of the Act. The Board served this charge on Respondent by mail on May 17, 2004.

On May 28, 2004, the Regional Director for Region 14 of the Board issued a Complaint and Notice of Hearing in Case 33–CA–14571 which alleged that Respondent violated Section 8(a)(5) and (1) of the Act. More specifically, the Complaint alleged that since January 20, 2004, Respondent had failed and refused to bargain in good faith with the Union by unilaterally subcontracting out the work performed by bargaining unit members and also by seeking to reduce the size of the Unit by unilaterally entering into fraudulent equipment lease agreements with certain bargaining unit members. It further alleged that on about April 1, 2004, Respondent executed a collective–bargaining agreement with the Union, and that also since about April 1, 2004, Respondent has refused to adhere to this agreement by failing and refusing to apply its terms to members of the Unit. The Complaint also alleged that since about February 6, 2004, Respondent had unilaterally reduced the size and work of the Unit by subcontracting out bargaining unit work resulting in reduced employment opportunities for unit members.

On June 23, 2004, the Union filed a charge against Respondent in Case 33–CA–14650. This charge alleged that Respondent violated Section 8(a)(1), (3) and (5) of the Act in mid–June 2004 by discharging Arthur Johnson because of his Union activities and/or his previous cooperation with the Board.

On July 8, 2004, the Union filed a charge against Respondent in Case 33–CA–14671. This charge alleged that Respondent, in late June or early July 2004, violated Section 8(a)(5) and (1) by offering Arthur Johnson employment as an independent contractor, by unilaterally changing terms of employment and by dealing directly with employees.

On July 15, 2004, Respondent filed an Answer to the Complaint in Case 33–CA–14571.

On July 30, 2004, the Regional Director for Region 14 of the Board issued a Consolidated Complaint and Notice of Hearing in Cases 33–CA–14616, 33–CA–14650, and 33–CA–14671. This Consolidated Complaint alleged, in part, that Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Dennis Tenner on about May 11, 2004 and by discharging employee Arthur Johnson on about June 21, 2004. It also alleged that Respondent violated Section 8(a)(5) and (1) in late June 2004 by bypassing the Union and dealing directly with Unit employees by negotiating terms and conditions of employment with Arthur Johnson.

Respondent filed an Answer, dated August 6, 2004, to this Consolidated Complaint.

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At this point, two separate complaints were pending against Respondent, namely, the May 28, 2004 Complaint in 33–CA–14571, and the July 30, 2004 Consolidated Complaint in Cases 33–CA–14616, 33–CA–14650, and 33–CA–14671. The Regional Director consolidated these two complaints through an "Order Further Consolidating Cases and Order Setting Date, Time and Place of Hearing," issued by the Officer–in–Charge of Subregion 33 on August 24, 2004.

On September 30, 2004, the General Counsel filed a motion to strike portions of Respondent's Answers. This motion will be discussed later in this decision under the heading "Procedural Rulings."

On October 14, 2004, the Union filed a charge in Case 33–CA–14737, alleging that Respondent had violated Section 8(a)(1), (3) and (5) by a number of actions including subcontracting all bargaining unit work in retaliation for employee union activities, repudiating the collective–bargaining agreement and withdrawing recognition from the Union by eliminating the bargaining unit. This charge named Gretchen Hudson and William Hudson as alter egos of and joint employers with HH3 Trucking, Inc.

On November 30, 2004, the Union amended this charge. The amended charge deleted some allegations in the original charge, including that Respondent had withdrawn recognition from the Union.

On December 13, 2004, the Union filed a second amended charge in Case 33–CA–14737. This amendment deleted the allegation that Respondent had repudiated the collective bargaining agreement by eliminating the bargaining unit, and added the allegation that Respondent had failed and refused to apply the collective bargaining agreement to members of the Unit.

On December 15, 2004, the Acting Regional Director issued a Complaint and Notice of Hearing in Case 33–CA–14737. Also on December 15, 2004, the Acting Regional Director issued an "Order Further Consolidating Cases and Order Rescheduling Hearing" which added Case 33–CA–14737 to the other four cases in the Consolidated Complaint.

On January 3, 2005, a hearing opened before me in Peoria, Illinois. Respondent's president, Ms. Gretchen Hudson, requested a postponement so that Respondent could obtain legal counsel. I denied that request, for reasons which will be discussed later in the decision. The government presented its evidence and the General Counsel rested. Ms. Hudson stated that she was not sure whether Respondent would be calling any witnesses, and I adjourned the hearing until the following morning.

When the hearing resumed on January 4, 2005, Ms. Hudson stated that Respondent would not be calling any witnesses. I adjourned the hearing until January 5, 2005, when the parties presented oral argument. Today, January 7, 2005, I am issuing this bench decision.

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Procedural Rulings

General Counsel's Motion to Strike

On September 30, 2004, the General Counsel moved to strike the portions of Respondent's Answers in which Respondent denied that it was engaged in interstate commerce, denied that the Union was a labor organization and the exclusive representative of the Unit, denied that the Unit was appropriate, and denied that Respondent had recognized the Charging Party as the collective–bargaining representative of the Unit. The government also moved to strike the portion of the Respondent's Answer in Case 33–CA–14571 which denied that Gretchen Hudson and William Hudson were statutory supervisors.

The General Counsel asserts that with respect to each of these denials, either Respondent previously had admitted the allegation and/or Judge Sandron found the allegation to be true in his Decision in Case 33–CA–14374, which the Board adopted and the Seventh Circuit enforced. The General Counsel's Motion to Strike further stated as follows: "With respect to the Respondent's denial of supervisory status of its owners, Gretchen and William Hudson in the Answer filed in Case 33–CA–14571, the Respondent has admitted to their supervisory status in. . .its Answers filed in Cases 33–CA–14374, 33–CA–14616, 33–CA–14650, and 33–CA–14671."

Further, the government argued, "Respondent has proffered no evidence of changed circumstances that would render any of the admissions or findings in Case 33–CA–14374 suspect, much less untrue."

Although Respondent's July 15, 2004 Answer in Case 33–CA–14571 appears to be unsigned, and therefore not in compliance with Section 102.21 of the Board's Rules and Regulations, the General Counsel has not moved to strike it for that defect. Presumably, an administrative law judge possesses the authority, under Section 102.35(13) of the Rules, to take such action sua sponte, but I do not believe it is necessary in the present instance.

Moreover, I conclude that it is not necessary to strike Respondent's Answers for any of the reasons asserted in the General Counsel's Motion. Even if all parts of Respondent's Answers remain in the record, it will not affect the resolution of any issue. The General Counsel moves to strike certain of Respondent's denials which, the government asserts, are contrary to established facts. However, to the extent that such facts have been established in prior Board proceedings involving the same parties, the doctrine of *res judicata* precludes me for reaching a contrary result. The Board has already spoken.

On the other hand, to the extent that the Board has not resolved such issues, it is appropriate to allow Respondent to litigate them. The General Counsel asserts that Respondent earlier admitted certain allegations that its subsequent Answers denied. Respondent's president, Ms. Gretchen Hudson, prepared these latter Answers. The government alleges her to be an alter

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ego of Respondent, and she testified at the hearing. To the extent either an Answer she signed or her testimony is inconsistent with other evidence, including prior statements, such a conflict bears on her credibility.

In sum, striking portions of Respondent's Answers would result in a record which is less complete. Therefore, I deny the General Counsel's motion.

Respondent's Request for a Continuance

On August 24, 2004, the Regional Director, by the Officer–in–Charge for Subregion 33, issued an "Order Further Consolidating Cases and Order Setting Date, Time, and Place of Hearing" which notified Respondent that the hearing would be conducted on October 18, 2004 in Peoria, Illinois. On October 7, 2004, Respondent's President, Gretchen Hudson, requested a continuance so that she could attend the birth of her grandchild. The Associate Chief Judge granted this request, postponing the hearing "to a date, time and at a place to be determined by the Officer–in–Charge of Sub–Region 33 of the Board."

By Order dated December 15, 2004, the Acting Regional Director scheduled the hearing to begin on Monday, January 3, 2004 in Peoria, Illinois. Respondent did not object to this date for more than two weeks.

On January 31, 2004, Respondent sent a postponement request by facsimile to the Board's Division of Judges, Atlanta Office. That day was a federal holiday and the office was not open. The postponement request stated that Respondent needed time to obtain legal counsel.

The next business day was Monday, January 3, 2005, when the hearing opened. I informed the parties on the record that Respondent's continuance request had been denied.

Considering that Respondent already had been granted one postponement, and considering further that Respondent delayed for two weeks after receiving notice of the rescheduled hearing date, a further postponement would not be in the interest of justice. The allegations being litigated concern the employees' Section 7 rights to union representation and the right of two discharged employees to reinstatement. These important rights would be adversely affected by delay.

Respondent is not new to the hearing process. After its previous experiences in unfair labor practice and compliance proceedings, not to mention the 10(j) hearing in United States District Court, Respondent should be very capable of assessing its need for legal counsel. The fact that Respondent did not ask for a continuance until the eve of the hearing suggests that it felt no urgent need to retain a lawyer for the present proceeding. In any event, its right to a second continuance must be balanced against the employees' Section 7 rights, which can be prejudiced by delay. In the present case, granting Respondent a second postponement request would be unwarranted.

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Filing and Service of Charges

In its Answer to the Complaint in Case 33–CA–14571, and in its Answer to the Consolidated Complaint in Cases 33–CA–14616, 33–CA–14650 and 33–CA–14671, Respondent admitted that the charges in these cases were filed and served as alleged. I so find.

Additionally, based upon the testimony of Board employee Sharon Short, which I credit, I find that the initial charge, and first and second amended charges in Case 33–CA–14737, were filed and served as alleged in the December 15, 2004 Complaint.

Jurisdiction

Respondent's Answers to the Complaint in Case 33–CA–14571 and to the Consolidated Complaint in Cases 33–CA–14616, 33–CA–14650 and 33–CA–14671 admit that it is an Illinois Corporation with an office and place of business in Rockford, Illinois, that it has been engaged in the business of hauling construction materials, that during the previous calendar year, it provided services valued in excess of $50,000 within the State of Illinois for Rockford Blacktop Construction Company, Inc. I so find.

These Answers also admit that at all material times, Rockford Blacktop Construction Company, Inc., with an office and place of business in Rockford, Illinois, has been engaged in the business of excavation, land clearing and road building. I so find.

However, Respondent has denied that during the preceding calendar year, Rockford Blacktop Company, Inc. purchased and received at its Rockford, Illinois facility goods valued in excess of $50,000 directly from points outside the State of Illinois. The General Counsel included these Complaint allegations to establish that Respondent satisfied a standard imposed by the Board for the exercise of its discretionary jurisdiction.

Moreover, Respondent has denied the Complaint allegations that at all material times, it has been engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act. These denials represent a change in Respondent's position. Respondent did not contest jurisdiction in Case 33–CA–14374.

In that case, Judge Sandron specifically found that Respondent was an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The Board adopted Judge Sandron's Decision and the Seventh Circuit Court of Appeals granted the Board's application for enforcement.

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Because that case involved exactly the same parties and resolved the same issue of jurisdiction presented here, the principle of *res judicata* applies. The Board already has settled both that Respondent is an employer engaged in commerce subject to the Board's statutory jurisdiction, and that Respondent meets an appropriate standard for the exercise of the Board's discretionary jurisdiction.

Arguably, a drastic change in circumstances since that determination might justify revisiting the issue, but the record here does not establish or even suggest such a change. For example, Respondent did not offer any records to establish that its own business had declined or that its customer, Rockford Blacktop, no longer purchased and received at least $50,000 worth of goods each year shipped directly to it from outside the State of Illinois. Accordingly, I conclude that the principle of *res judicata* controls.

Moreover, a number of the unfair labor practice allegations in the present case would, if proven, constitute a continuation of the conduct found violative in 33–CA–14374. In that case, Respondent unlawfully discharged four individuals. In compliance with an injunction issued by the United States District Court for the Northern District of Illinois, and with the Board's Order, Respondent offered reinstatement to all four discriminatees and reinstated the two who accepted, Arthur Johnson Jr. and Dennis Tenner. In this case, the government alleges that Respondent then unlawfully discharged Johnson and Tenner a *second* time.

Assuming that the evidence establishes that the second discharges were unlawful, it is necessary for the Board to assert jurisdiction in the present case to make its order in the previous case effective. Therefore, I conclude that Respondent remains an employer engaged in commerce within the meaning of Section 2(2), (6) and (7), and remains subject to the Board's jurisdiction.

Labor Organization Status

Respondent has denied that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act. It has also denied that the Charging Party is the exclusive representative of its employees in a unit appropriate for collective–bargaining. On the other hand, Respondent's Answers *admit* that Respondent entered into a collective–bargaining agreement with the Charging Party and this collective–bargaining agreement, including its recognition clause, is in evidence.

Presumably, Respondent does not intend to create the impression that it recognized and entered into an agreement with a union which does not enjoy the support of a majority of its employees in an appropriate collective–bargaining unit, because that would be tantamount to admitting that it violated Section 8(a)(2) of the Act.

The principle of *res judicata* again applies. In Case 33–CA–14374, the Board held that the Charging Party was a labor organization within the meaning of Section 2(5) of the Act, and that holding controls here. But even in the absence of *res judicata*, I would find the Charging

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Party to be a Section 2(5) labor organization based upon the collective–bargaining agreement signed by Respondent and the credited testimony of Union Representative Thomas Streck.

Additionally, based upon the Board's Decision in the previous case and the Regional Director's Decision and Direction of Election in Case 33–RC–4792, I find that the Charging Party is the exclusive representative, pursuant to Section 9(a) of the Act, of the following unit of employees, which is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

> All full–time and regular part–time drivers employed by Respondent at its Rockford, Illinois facility, EXCLUDING owner–operators, office clerical and professional employees, guards and supervisors as defined in the Act.

Supervisory Status

The government alleges that Respondent's two owners, Gretchen Hudson and William Hudson (the corporation's president and vice president, respectively), are supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act. Respondent's Answer to the Complaint in Case 33–CA–14571 denies the supervisory allegations, but Respondent's Answer to the Consolidated Complaint in Cases 33–CA–14616, 33–CA–14650 and 33–CA–14671 *admits* these same allegations.

This conflict between Respondent's Answers gives me something to think about while weighing credibility, but it doesn't really pose a problem. In Case 33–CA–14374, Judge Sandron stated that "It is uncontested that. . .the Respondent's sole owners and officers, Gretchen and William Hudson, are supervisors and agents of the Respondent under Sections 2(11) and 2(13) of the Act." By adopting Judge Sandron's Decision, the Board made this conclusion *res judicata*.

But even if that doctrine did not preclude relitigation of the supervisory issue, the record clearly establishes that the Hudsons, as owners of Respondent, possessed that status. Indeed, Respondent admits that it discharged employee Dennis Tenner and its president, Gretchen Hudson, signed the discharge notice. She also signed the collective bargaining agreement with the Union.

In sum, I find that Respondent's President Gretchen Hudson and Vice President William Hudson are supervisors within the meaning of Section 2(11) of the Act and Respondent's agents within the meaning of Section 2(13) of the Act.

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Unfair Labor Practice Allegations
In Case 33–CA–14571

Complaint Paragraphs 6(a) and 6(b)

Paragraph 6(a) of the May 28, 2004 Complaint alleges that since about January 20, 2004 and continuing to date, Respondent has failed and refused to bargain in good faith with the Union by unilaterally subcontracting out the work performed by bargaining unit members. Complaint Paragraph 9 alleges that this action violated Section 8(a)(5) and (1) of the Act.

Paragraph 6(b) of the May 28, 2004 Complaint alleges that since about January 20, 2004 and continuing to date, Respondent has failed and refused to bargain in good faith with the Union by seeking to reduce the size of the Unit by unilaterally entering into fraudulent equipment lease agreements with certain bargaining unit members. To place this allegation in context, some background may be helpful.

At the representation hearing in Case 33–RC–4792, Respondent initially contended that all of its drivers were independent contractors rather than employees. The Regional Director's Decision and Direction of Election rejected this argument.

Respondent's Answer in the unfair labor practice case heard by Judge Sandron raised the defense that the four alleged discriminatees had not been "employees" but "independent contractors." However, as Judge Sandron's Decision states, "Respondent's counsel withdrew this affirmative defense during the hearing, and the Respondent does not now contest the status of such drivers as employees."

Based on Judge Sandron's finding, adopted by the Board, and also considering the Regional Director's Decision and Direction of Election in Case 33–RC–4792, I conclude that the drivers performing bargaining unit work were Respondent's employees. It would be unlawful for Respondent to convert them unilaterally into independent contractors, which simultaneously would reduce the size of the bargaining unit and the amount of unit work.

Driver Darnell McLin testified that sometime in February 2003, Ms. Hudson came to him at a gasoline station in Rockford, Illinois, gave him an "Equipment Lease Agreement" and told him he would have to sign it. (This "Agreement" is in evidence as General Counsel's Exhibit 4. McLin's signature is dated February 6, 2004, and I find that he signed the document on that date.)

This "Agreement" purported to create a lessor/lessee relationship whereby the driver would be leasing the truck from Respondent. However, McLin credibly testified, the parties did not comply with its terms. For example, the "Agreement" stated that the Lessee agreed to pay the Lessor $500 per month, but he never made any such payment.

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The "Agreement" also provided that Respondent would pay McLin 40 percent of the income the truck generated, but Respondent never told McLin how much the truck earned. Although the "Agreement" specified that the lessee would pay all maintenance and repair costs, Respondent never required McLin to do so.

Another driver, Todd Walker, is the nephew of Ms. Hudson, whom he calls "Aunt Gretchen." Walker credibly testified that Ms. Hudson asked him to sign an "Equipment Lease Agreement" but didn't require him to do so. On February 6, 2004 he did sign the "Agreement," which is in evidence as General Counsel's Exhibit 5. Respondent didn't make him comply with its terms.

Union Representative Thomas Streck, whom I credit, testified that Respondent had neither notified nor bargaining with the Union concerning entering into these agreements with drivers.

Clearly, the evidence establishes that Respondent dealt unilaterally with certain bargaining unit employees to cause them to sign these "Equipment Lease Agreements" as alleged. The Complaint also alleges that these "Agreements" were fraudulent and that Respondent was seeking to reduce the size of the bargaining unit.

The record establishes that Respondent didn't try to enforce the terms of such "Agreements." It appears unlikely that Respondent was pursuing a legitimate business purpose when it caused employees to enter into agreements that would not be followed.

In view of the position Respondent took in the representation case – that all its drivers were independent contractors – and considering the similar position it took initially in Case 33–CA–14374, I conclude that Respondent was trying to create the appearance that its drivers were independent contractors without actually losing control of the drivers' conditions of employment.

As I will discuss later in this decision, after Respondent discharged drivers Tenner and Johnson, it offered to put them back to work if they would sign lease agreements which, presumably, would either make them independent contractors or create that appearance. Considering this fact together with the other evidence, I conclude that Respondent was engaging in a persistent effort to reduce the size of the bargaining unit by turning unit employees into ersatz independent contractors.

Respondent didn't notify or bargain with the Union before approaching employees directly and soliciting them to sign the "Equipment Lease Agreements." Accordingly, I recommend that the Board find that the General Counsel has proven the allegation set forth in Paragraph 6(b) of the Complaint.

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Complaint Paragraph 7

Paragraph 7(a) of the Complaint alleges that on or about April 1, 2004, the Charging Party and the Respondent executed a collective bargaining agreement covering the unit. Respondent has admitted this allegation and I so find.

Paragraph 7(b) alleges that since about April 1, 2004, the Charging Party has been requesting that the Respondent adhere to this collective bargaining agreement. Respondent has denied this allegation.

By letter dated November 30, 2004, Business Representative Streck reminded Respondent's President Hudson of Respondent's contractual obligation to make contributions to health, welfare and pension funds on behalf of the bargaining unit employees. However, the record does not establish that the Union had requested that Respondent follow the contract before this date. After the court reporter has transcribed the hearing, I will review the transcript and reach a final conclusion on this issue, and will address that matter in the Certification of Bench Decision.

Complaint Paragraphs 8

Complaint Paragraph 8(a) alleges that since about February 6, 2004, and continuing to date, Respondent has unilaterally reduced the size and work of the Unit by subcontracting out bargaining unit work resulting in reduced employment opportunities for unit members. Complaint Paragraph 8(b) alleges that Respondent did so because its employees assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. Complaint paragraph 9(b) alleges that Respondent thereby violated Section 8(a)(3) and (1) of the Act.

This allegation will be discussed later in this decision in connection with allegations set forth in Case 33–CA–14737.

Unfair Labor Practice Allegations
In Cases 33–CA–14616, 33–CA–14650 and 33–CA–14671

Paragraph 5 of the July 30, 2004 Consolidated Complaint in Cases 33–CA–14616, 33–CA–14650 and 33–CA–14671 alleges that about May 11, 2004, Respondent discharged its employee Dennis Tenner, and that about June 21, 2004, Respondent discharged employee Arthur Johnson. Respondent has admitted both of these allegations, and I so find.

Paragraph 5 also alleges that Respondent discharged these employees because they assisted the Union and engaged in concerted activities and to discourage employees from engaging in such activities. Respondent has denied these allegations.

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In evaluating these allegations, I will follow the framework established by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must establish a link, or nexus, between the employees' protected activity and the adverse employment action.

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, at 1089. See also *Manno Electric, Inc.*, 321 NLRB 278, 280 at fn. 12 (1996).

The evidence clearly establishes the first two *Wright Line* elements for both Johnson and Tenner. In Case 33–CA–14374, the Board found that Respondent previously had discharged both Johnson and Tenner unlawfully, ordered Respondent to reinstate them, and to pay them backpay. More specifically, the Board found that Respondent owed Johnson $16,562.25 in backpay, plus interest, and owed Tenner $12,274.88 plus interest. Those sums are large enough to assure Respondent took notice of the two employees' protected activities.

The record also establishes the third *Wright Line* element. Discharge is certainly an adverse employment action.

Finally, the government must establish a link or nexus between the protected activities and the adverse employment action. In finding such a link, I note the extensive evidence of animus which the Board found in the previous Case 33–CA–14374. That alone suffices to establish such a link.

Moreover, based on Tenner's credited testimony, I find that after Respondent discharged him, Respondent offered to allow Tenner to work again if he would sign an agreement which ostensibly would establish his status as an owner–operator rather than an employee. Respondent made a similar offer to Johnson after discharging him.

Obviously, if Respondent really had been dissatisfied with the work of either driver, it wouldn't have allowed that individual to perform additional work even as a putative independent contractor. Respondent's design, to rid itself of the bargaining unit, is unmistakable.

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As stated by the Board in *Lampi LLC*, 327 NLRB 222 (1998)

> To establish an affirmative defense under *Wright Line* to a discriminatory discharge allegation, an employer must do more than show that it had reasons that *could* warrant discharging the employee in question. It must show by a preponderance of the evidence that it *would* have done so even if the employee had not engaged in protected activities. In assessing whether the Respondent has established this defense regarding [the alleged discriminatee's] discharge, we do not rely on our views of what conduct should merit discharge. Rather we look to the Respondent's own documentation regarding [the alleged discriminatee's] conduct, to its "Personnel Policy" handbook, and to the evidence of how it treated other employees with recorded incidents of discipline.

In this case, Respondent has produced no documentation to demonstrate that it treated other employees the same way in similar situations. Although the General Counsel subpoenaed extensive documentation from the Respondent, the Respondent refused to comply with the subpoena. Therefore, even if Respondent later had offered documentary evidence to support a *Wright Line* defense, it would not have been entitled to introduce it.

In sum, I conclude that Respondent discharged Johnson and Tenner in retaliation for their union and protected activities, and recommend that the Board find that Respondent thereby violated Section 8(a)(3) and (1) of the Act.

Unfair Labor Practice Allegations in 33–CA–14737

As already discussed, Complaint Paragraph 8 in Case 33–CA–14571 alleges that since about February 6, 2004, and continuing to date, Respondent has unilaterally reduced the size and work of the Unit by subcontracting out bargaining unit work resulting in reduced employment opportunities for unit members.

As the General Counsel stated in oral argument, the Complaint in Case 33–CA–14737 includes a similar allegation. In this latter instance, however, the record establishes that subcontracting in about September 2004 eliminated the remaining jobs in the bargaining unit.

Based on the credited evidence, I find that Respondent did not notify or afford the Union an opportunity to bargain before making such changes. Respondent thereby violated Section 8(a)(5) and (1) of the Act.

Piercing the Corporate Veil

The General Counsel has alleged that Respondent's two owners, Gretchen and William Hudson, are alter egos of the corporation and/or joint employers with the corporation. The government seeks to hold the Hudsons individually liable for the corporation's unfair labor practices. (To be precise, Board law treats an alter ego theory somewhat differently than it treats the issue of whether an individual should be held liable for the acts of a corporation which he controls, sometimes called "piercing the corporate veil." See *AAA Fire Sprinkler, Inc.*, 322

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NLRB 69 (1996); *White Oak Coal Co.*, 318 NLRB 732 (1995). The basic issue here concerns the Hudsons' liability, as individuals, to remedy the unfair labor practices.)

The Board, in its Supplemental Decision in Case 33–CA–14374, resolved this issue by adopting Judge Michael Rosas's conclusion that Gretchen Hudson and William Hudson should be held individually liable for Respondent's unfair labor practices. That conclusion has *res judicata* effect.

Even if the Board had not spoken on this issue, a preponderance of the evidence in this case establishes that the Hudsons commingled personal and corporate funds, and diverted corporate funds for noncorporate purposes, such as making payments to a casino. Were the issue before me, I certainly would conclude that the corporate veil should be pierced.

Remedy

In this case, Respondent has demonstrated not only a passive disregard of its obligations under the law, but an active determination to evade those obligations, even at the risk of being held in contempt by two federal courts. Therefore, I am concerned that the discriminatees in this case and in the earlier Case 33–CA–14374 may never receive a make whole remedy unless the Board acts quickly to prevent Respondent and its principals from dissipating whatever assets remain.

This concern, that the unfair labor practices might go unremedied, arises in part from Respondent's apparent willingness to flout the orders of two federal courts. Clearly, the fear of being held in contempt has not proven sufficient to protect Respondent's assets from Respondent's owners.

As already discussed, the United States District Court for the Northern District of Illinois, Western Division, issued a temporary injunction against Respondent on December 9, 2003. The Court ordered Respondent to offer interim employment to four discharged employees, including Arthur Johnson Jr. and Dennis Tenner, the two individuals who are discriminatees in the present case. Respondent did offer such employment, but when Johnson and Tenner accepted, Respondent allowed them to work only a short time before discharging them again. Respondent offered patently pretextual reasons for these discharges, suggesting that it had no intention of taking the Court's order seriously.

The temporary injunction also prohibited Respondent from "transferring or subcontracting bargaining unit work without providing the Union with notice and opportunity to bargain." However, credited evidence establishes that Respondent did precisely that. Without notifying the Union or affording it an opportunity to bargain, Respondent directly solicited employees to enter into ostensible owner–operator relationships.

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By its terms, the temporary injunction remains in effect "pending the final disposition of the matters herein now pending before the National Labor Relations Board," in other words, the matters raised in Case 33–CA–14374. There has been no final disposition in that case. To the contrary, even though the Board has ordered Respondent to pay to the discriminatees more than $38,000, plus interest, Respondent has not. However, the prospect of being held in contempt of court has not deterred Respondent from committing further unfair labor practices.

On September 14, 2004, the United States Court of Appeals for the Seventh Circuit, enforcing the Board's Order in Case 33–CA–14374, ordered Respondent to make the four discriminatees in that case whole for any losses of earning and other benefits suffered as a result of the discrimination against them.

It would be reasonable to assume that Respondent would take immediate steps to comply with this Order, and that if Respondent's bank account was too small to pay the entire $38,000 plus interest, Respondent at least would pay part of the amount and seek to pay the rest in installments. A prudent business would take such action because interest continues to accumulate on the unpaid balance and also because failing to comply with the Court's order could lead to a contempt citation.

Evidence does not establish that Respondent wrote any backpay check to comply with the Court's order. However, banking records do establish that in October 2004, about a month after the Court's order, one of Respondent's owners withdrew more than $2,600 from the corporate account and paid it to a gambling casino in Elgin, Illinois.

The banking records also show a significant number of instances in which Respondent had to pay overdraft fees as well as other instances in which the bank returned checks because of insufficient funds. Ms. Hudson's testimony also establishes that she and her husband use the same account for both personal and corporate purposes.

In this unusual situation, in which personal payments to a casino have taken precedence over compliance with a Court order, there is no assurance that any money will be left when and if Respondent decides to write a check for backpay. Therefore, I recommend that the Board act quickly to assure that Respondent complies with both outstanding Court orders while Respondent still has some financial ability to do so.

This recommendation may seem somewhat gratuitous because Case 33–CA–14374 is not before me. However, in a very real sense, the present cases involve a continuation and extension of the prior unremedied unfair labor practices. Moreover, the unfair labor practices established in the present proceeding also constitute breaches of the Board's and Courts' previous orders.

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Other matters concerning the remedy will be addressed in the Certification of Bench Decision.

Conclusion

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, Remedy, Order and Notice. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT discharge employees because our employees selected the Union, International Brotherhood of Teamsters, Local 325, to represent them or to discourage employees from engaging in Union and/or other protected concerted activities.

WE WILL NOT discriminate against employees by subcontracting out bargaining unit work.

WE WILL NOT make changes in the terms and conditions of employment of bargaining unit employees without first notifying the Union and affording it the opportunity to bargain about such proposed changes and their effects.

WE WILL NOT bypass the Union and deal directly with bargaining unit employees concerning their terms and conditions of employment.

WE WILL NOT fail to abide by and apply all the terms of the collective–bargaining agreement we entered into with the Union.

WE WILL NOT require or request that any bargaining unit employee enter into a purported lease for rental of a truck or other equipment.

WE WILL NOT in any other manner interfere with, restrain or coerce employees in the exercise of rights guaranteed by the National Labor Relations Act.

WE WILL recognize and bargain with the Union as the exclusive representative of employees in the following bargaining unit:

All full–time and regular part–time drivers employed by HH3 Trucking, Inc. at its Rockford, Illinois facility, EXCLUDING owner–operators, office clerical and professional employees, guards and supervisors as defined in the Act.

WE WILL apply the collective–bargaining agreement we entered into with the Union on April 1, 2004, and WE WILL pay to the health, welfare and pension funds all back contributions, with interest, which we owe because we previously failed to abide by the agreement.

WE WILL make our bargaining unit employees whole, with interest, in all other respects for all losses they suffered because we failed to abide by the terms of the collective–bargaining agreement.

WE WILL rescind all purported equipment leases we entered into with our employees and **WE WILL** make them whole, with interest, for all expenditures they made in connection with those leases.

WE WILL offer immediate and full reinstatement to Arthur Johnson and Dennis Tenner to their former positions, or to substantially equivalent positions if their former positions no longer are available, and make them whole, with interest, for all losses they suffered because we unlawfully discharged them.

WE WILL offer immediate and full reinstatement, to their former positions or to substantially equivalent positions if their former positions are not available, to all employees in the bargaining unit who lost their jobs at any time on and after February 6, 2004 because we unlawfully reduced the size of the bargaining unit.

WE WILL make whole, with interest, all bargaining unit employees for all losses they suffered at any time on and after January 20, 2004 because we unlawfully reduced the size of the bargaining unit by subcontracting out bargaining unit work.

HH3 TRUCKING, INC., and
GRETCHEN HUDSON, Alter Ego/Joint Employer,
and WILLIAM HUDSON, Alter Ego/Joint Employer
(Employer)

Dated: _____ **By:_____**
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

300 Hamilton Boulevard, Suite 200, Peoria, IL 61602-1246
(309) 671-7080, Hours: 9:30 a.m. to 6:00 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (309) 671-7085